No. 87-212

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In the Supreme Court of the United States

OCTOBER TERM, 1987

AMATEYUS LTD., D/B/A VOLK & HUXLEY, ET AL.,
PETITIONERS
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's findings that (1) a successor company had assumed its predecessor's collective bargaining agreement, and (2) another company was the alter ego of the successor and therefore also obligated to honor the collective bargaining agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 817 F.2d 996. The decision and order of the National Labor Relations Board (Pet. App. D1-D3; Pet. Supp. App. D1-D6) and the decision of the administrative law judge (Pet. App. 1b-83b) are reported at 280 N.L.R.B. No. 21.

JURISDICTION

The judgment of the court of appeals (Pet. Supp. App. C1-C2) was filed on May 1, 1987. The petition for a writ of certiorari was filed on July 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In mid-1981, petitioner Amateyus, Ltd. purchased the assets and the right to use the name of Volk & Huxley, Inc., a New York City typography and composition shop. Volk & Huxley's employees had been represented by New York Typographical Union No. 6 (the Union) for more than 30 years (Pet. App. 5a, 9b-11b).

Amateyus's president and sole shareholder, John Corigliano, also known as John Cory, continued the operation of Volk & Huxley at its previous location, and hired all composing room unit employees formerly employed by Volk & Huxley (Pet. App. 6a). Amateyus also retained salesmen Ed Trager and Steve Hoffman, who brought Volk & Huxley's customers with them (*id.* at 6a, 10b, 12b). In addition, Amateyus honored the collective bargaining agreement that had previously been in effect between Volk & Huxley and the Union. That agreement was not due to expire until October 1985. Amateyus maintained the contractual hours, wages and holidays prescribed in the agreement and it also adhered to the contractual procedures for layoffs, deducting union dues, and remitting employee deductions to the Union's vacation fund (*id.* at 6a, 12b-14b).

By October 1981, Amateyus was delinquent in remitting employee contributions to the Union's benefit and productivity, pension, and welfare funds (Pet. App. 7a, 14b). John Cory met with the Union's business agent, Murray Itkowitz, and agreed to pay $5,000 per week in order to make current Amateyus's accounts with the Union. On October 30 and November 10, 1981, John Cory delivered checks in the amount of $5,000 and $5,100.54, respectively, payable to the Union's benefit and productivity fund (*ibid.*).

During a conversation with Itkowitz about Amateyus's fund payment arrearages, John Cory stated that Amateyus needed relief from certain provisions of the collective bargaining agreement in order to survive. At Cory's request, Itkowitz arranged a meeting between Cory and Union president Bertram Powers, who was then negotiating with the Printers

League concerning the League's requests for relief during the four remaining years of the current contract (Pet. App. 15b). When he met with Cory, Powers asked for a written statement of the contractual changes Amateyus sought (*id.* at 15b-16b). Cory submitted a letter requesting that the Union eliminate or reduce certain assessments and that it change several work classifications (*id.* at 7a). In December, Itkowitz told Cory that the Union would not agree to those contract modifications and that Amateyus would have to look to the outcome of the Union's negotiations with the Printers League as the source of any relief. Amateyus made no further payments to the Union's funds (*id.* at 7a-8a, 16b-17b).

In January 1982, John Cory leased offices suitable for a typesetting shop in the building adjacent to Amateyus's offices and paid a security deposit of $11,000 (Pet. App. 8a, 18b-19b). At the end of January, John Cory's brother Mark met with an attorney recommended by John to incorporate Vulcan Typography Co., Ltd. as a phototypesetting operation (*id.* at 28b-29b). The certificate of incorporation initially listed John Corigliano as the incorporator, but "John" was later crossed out and Mark's name was substituted on the certificate (*id.* at 29b). At the time, Mark was 20 years old and a full-time college student who was financially supported by his parents (*id.* at 26b-27b).

At his brother John's suggestion, Mark Cory hired Amateyus's night foreman, John Sartori, as Vulcan's general manager (Pet. App. 9a, 29b-30b). In mid-January 1982, Sartori began recruiting rank-and-file employees from Amateyus, telling them that conditions were bad at Amateyus and that the bosses were going to close down and open a new shop that would be nonunion. While offering a job to Robert Mariani, Sartori stated that he should " 'either go with them or you're going to go down. You're better off going with them, because the Union can't get you any work' " (*id.* at 9a, 30b-31b).

As Vulcan was being readied for operation, Amateyus began laying off bargaining unit employees and subcontracting

out an increasing amount of unit work (Pet. App. 9a-10a). Amateyus neither notified, nor offered to bargain with, the Union concerning the increased subcontracting (*id.* at 25b-26b). On February 26, 1982, Amateyus announced the elimination of one shift; on March 4, it posted a notice stating that all but two employees would be laid off on March 8 (*id.* at 10a, 23b-24b). The employees who remained at Amateyus were instructed to give Vulcan's phone number to any callers seeking John Cory, or salesmen Trager and Hoffman (*id.* at 25b).

Vulcan opened for business on March 1, 1982, with Sartori as its general manager and with Amateyus's former service manager (Joe DeVita) performing the same function for Vulcan (Pet. App. 33b-35b). Salesmen Trager and Hoffman comprised Vulcan's sales staff and provided Vulcan with all of its business. Several Corigliano family friends who had worked for Amateyus transferred to administrative positions with Vulcan, as did the Coriglianos' aunt, Marie Manley, who became Vulcan's bookkeeper (*id.* at 10a, 35b). All of Amateyus's equipment, furniture and fixtures not subject to liens or other lease agreements were moved to Vulcan (*id.* at 19b-23b). Vulcan did not observe the Union contract; it instituted a longer workweek than the contract specified, paid wages below contract rates, offered no health benefits, and placed all employees in a single job classification (*id.* at 16a, 39b-40b).

John Cory worked 50 hours for Vulcan during its first week of operation; his work for Vulcan averaged approximately 35 hours during each of the next five weeks and primarily involved supervising the day shift (Pet. App. 35b-36b). He remained on Vulcan's payroll for the following ten weeks—April 13, 1982, to June 13, 1982—and was issued paychecks for each of these weeks in the amount of $933 ($1,000, less $67 deducted for taxes) (*id.* at 37b). Mark Cory received no salary from Vulcan, and, while he assertedly was entitled to receive dividends, no dividends were paid (*id.* at 34b).

On March 15, 1982, Amateyus laid off its remaining two employees and ceased operations (Pet. App. 10a, 24b, 33b). In May 1982, Vulcan advertised in a trade publication for ad-

ditional advertising salesmen and typographers; the advertisement described Vulcan as " 'free of Union restraints' " (*id.* at 41b-42b).

2. The Board, upholding the decision of the administrative law judge, found that Amateyus, which concededly was the successor to Volk & Huxley, had assumed the latter's collective bargaining agreement with the Union (Pet. App. 54b-58b), and that Vulcan was the alter ego of Amateyus and therefore also was obligated to adhere to the contract (*id.* at 50b-54b, 59b). Accordingly, the Board found that the two companies violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by repudiating the collective bargaining agreement with the Union, by changing wage rates and other terms and conditions of employment, by refusing to recognize and bargain with the Union at Vulcan, and by increasing the subcontracting of unit work without notice to or bargaining with the Union (Pet. App. 59b-60b, 61b-65b). The Board further found that the companies violated Section 8(a)(3) and (1), 29 U.S.C. 158(a)(3) and (1), by laying off employees in March 1982 because of their union membership and by conditioning their employment at Vulcan on abandonment of union membership. In addition, the Board found that the companies violated Section 8(a)(1), 29 U.S.C. 158(a)(1), by threatening employees with plant closure and job loss because of their union membership (Pet. App. 60b-61b).

In support of its finding that Amateyus had assumed the collective bargaining agreement, the Board noted that Amateyus not only had maintained the existing terms of employment but also had requested the Union to modify the terms of the existing contract without ever suggesting that the contract was no longer binding (Pet. App. 56b-58b). In support of its finding that Vulcan was Amateyus's alter ego, the Board, adopting the administrative law judge's determination that the Cory brothers' contrary testimony was not credible (*id.* at 43b-50b), concluded that the transaction between Vulcan and Amateyus was merely "a shuffling of ownership interest in the same family," undertaken "for the purposes of avoidance of the Union and the

contract'' (*id.* at 53b, 54b).

3. The court of appeals enforced the Board's order (Pet. App. 4a-20a). The court rejected petitioners' contention that in taking over Volk & Huxley's business, Amateyus followed the contract terms only because it was legally required to do so. The court agreed with the Board that Amateyus ''chose to adhere to the terms of the Union's agreement with Volk & Huxley'' (*id.* at 12a). The court further found that ''[s]ubstantial evidence supports the NLRB's conclusion that Vulcan was Amateyus's alter ego and so was bound by Volk & Huxley's collective bargaining agreement'' (*id.* at 14a).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner contends (Pet. 13, 16) that the record does not support the Board's findings, upheld by the court of appeals, that Amateyus adopted the union contract and that Vulcan was the alter ego of Amateyus. These questions raise no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, the record amply supports the findings upon which the Board and the court of appeals concurred.

In *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272, 281 (1972), the Court held that a successor employer is required to recognize and bargain with the collective bargaining representative of the predecessor's employees. While the successor may set the initial terms of employment on which it will hire the predecessor's employees, if the successor retains the preexisting terms it may not subsequently change those terms without bargaining with the Union (406 U.S. at 294-295). Moreover, while the successor is not required to assume the predecessor's collective bargaining agreement, the Court in *Burns* recognized that ''[i]n many cases * * * successor employers will find it advantageous not only to recognize and bar-

gain with the union but also to observe the pre-existing contract rather than to face uncertainty and turmoil'' (*id.* at 291). The Court also recognized that ''in a variety of circumstances involving a merger, [a] stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract'' (*ibid.*).

In this case the Board found that petitioner Amateyus assumed its predecessor's collective bargaining agreement. That finding was based not merely on the fact that Amateyus preserved the existing terms of employment, but also on the fact that Amateyus's dealings with the Union reflected an intention to assume the contract. The court of appeals stated that (Pet. App. 13a), ''[p]erhaps the strongest evidence of adoption is that John Cory in fact tried to negotiate certain modifications of the contract with the Union, even as Amateyus adhered to the * * * contract and gave no indication that in any [event] it would not do so.'' See, *e.g.*, *NLRB* v. *Pine Valley Div. of Ethan Allen, Inc.*, 544 F.2d 742, 746 (4th Cir. 1976); *NLRB* v. *World Evangelism, Inc.*, 656 F.2d 1349, 1355 (9th Cir. 1981).

2. There is no merit to petitioners' contention (Pet. 16-17) that the Board based its finding that Vulcan was the alter ego of Amateyus solely on the fraternal relationship between John and Mark Cory. The court of appeals perceived that ''[i]n determining whether Vulcan was the alter ego of Amateyus, the NLRB looked at the usual factors—whether Vulcan had substantially the same business purpose, operations, equipment, customers, management and supervision as Amateyus; whether it was controlled by the old employer; and whether it was incorporated in order to evade obligations to the Union'' (Pet. App. 13a-14a (citations omitted)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
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